

# BANKING ALERT

August 2023

## ***New Jersey Appellate Division Affirms Dismissal of Action Against Financial Institution Based on Ineffective Power of Attorney***

In *McFadden v. Pentagon Federal Credit Union*, Docket No. A-3538-20 (N.J. App. Div. Jul. 27, 2023), the New Jersey Appellate Division affirmed the trial court's dismissal of a complaint claiming that a financial institution improperly allowed more than \$330,000 to be transferred pursuant to a defective power of attorney.

The complaint alleged that, in 1998, Joan McFadden, now deceased ("Decedent"), executed a general durable power of attorney (the "POA") appointing her nephew, John McFadden ("John"), her agent, and her niece, Mary Sexton ("Mary"), as her alternate agent. Later that year, Decedent executed a will which left the residue of her estate in equal parts to John, Mary, Joseph McFadden ("Joseph"), and ten of Decedent's other nieces and nephews. John and Mary were appointed co-executors under the will.

In January 2001, Decedent entered a nursing home, at which time she maintained brokerage accounts with Morgan Stanley (the "Accounts"). Mary was the account executive at Morgan Stanley for those accounts. The POA stated that it would only become effective in the event that Decedent was declared incapacitated by either a court or two physicians. None of the contingencies in the POA occurred prior to Decedent's death in October 2002. Between January 2001 and October 2002, more than \$330,000 was transferred from the Accounts under the POA and were used by John for his own personal benefit. After Decedent passed away, John applied for probate of the will, falsely representing he was Decedent's only next of kin. After letters testamentary were issued to John, the rest of Decedent's family ultimately uncovered John's malfeasance in late 2011. In 2012, the beneficiaries under the will filed a complaint against John. In 2014, after some discovery in the litigation, the beneficiaries sought to add Morgan Stanley and Pentagon Federal Credit Union ("Pentagon") as parties. That application was denied as the trial court found that the claim against Morgan Stanley was time barred. In December 2014, the beneficiaries filed a new lawsuit against Morgan Stanley and Pentagon based on the allegedly improper transfers, asserting

### **In This Issue**

New Jersey Appellate Division Affirms Dismissal of Action Against Financial Institution Based on Ineffective Power of Attorney

**Pg 1**

New Jersey Appellate Division Refuses to Vacate Foreclosure Sale Based on Allegedly Defective Notice of Sale

**Pg 2**

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claims of breach of contract, breach of fiduciary duty, and negligence. The trial court dismissed the action against Morgan Stanley as time-barred under the applicable six-year statute of limitations. In finding the claims against Morgan Stanley time-barred, the trial court rejected the contention that the discovery rule or the doctrine of equitable tolling provided the plaintiffs refuge from the statute of limitations.

On appeal, the Appellate Division affirmed for substantially the same reasons set forth by the trial court, namely that Joseph, who was the administrator and named plaintiff, stands in the shoes of the testator by operation of law and, as such, the relevant inquiry is whether Decedent, not Joseph, should have been aware of any alleged conduct on the part of Morgan Stanley. The Appellate Division also rejected Joseph's contention that Decedent's change of address meant that Decedent was unaware of the transfers identified on the bank statements, noting that the "action accrued when the statements were sent[.]" The Appellate Division, lastly, rejected application of the doctrine of equitable tolling, holding that there was no allegation that Morgan Stanley induced the delay in filing suit.

### **New Jersey Appellate Division Refuses to Vacate Foreclosure Sale Based on Allegedly Defective Notice of Sale**

In *Federal National Mortgage Association v. Cirilo Alvarez, et al.*, Docket No. A-3311-21 (N.J. App. Div. Aug. 15, 2023), the New Jersey Appellate Division found that the trial court did not abuse its discretion in denying defendants' second motion to vacate the foreclosure sale.

Defendants Cirilo and Alicia Alvarez (together, "Defendants") defaulted on their mortgage in March 2013 and, after a foreclosure action was instituted, default was subsequently entered by the trial court in January 2017. As a result of Defendants' default, plaintiff Federal National Mortgage Association ("Plaintiff") obtained a final judgment in December 2017.

The foreclosure sale was delayed to July 20, 2021 as a result of bankruptcy-related delays and the COVID-19 pandemic. Later, Plaintiff voluntarily adjourned the sale while a vacancy requirement was in effect for foreclosure sales. After the vacancy requirement was lifted, the sale finally occurred on September 14, 2021.

Defendants then filed a motion to vacate the sale alleging that they did not receive notice of the sale date. In response to the motion, Plaintiff maintained that it served notice on Defendants on or about August 13, 2021, through a third-party service, but there was no tracking associated with the mailing. However, Plaintiff submitted an invoice from the third-party service related to the mailing. The trial court denied the motion to vacate and Defendants appealed.

In affirming the trial court's order denying the motion, the Appellate Division noted that even though Rule 4:65-6 does not explicitly provide that the foreclosing lender must provide notice of an adjourned sale date, case law makes clear that some form of notice of an adjourned sale is required. To satisfy this requirement, the trial court had determined that some reasonable communication informing the property owner that sale had been adjourned and the actual date of the sale would suffice.

Here, the Appellate Division found that Plaintiff served the original foreclosure sale notice via regular and certified mail, as well as including it in an advertisement in the newspaper. The notice of the adjourned date was sent to Defendants via regular mail.

Accordingly, the Appellate Division found that Plaintiff made a reasonable communication of the adjourned sale to Defendants prior to the ultimate foreclosure sale through the use of regular mail and, therefore, held that the trial court did not abuse its discretion in denying the motion to vacate the foreclosure sale.

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